No. 1040

FILED
MAY 16 1945
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1944

EX PARTE HAWKE

GEORGE S. HAWKE,
Petitioner.

PETITION FOR REHEARING OF ORDER DENYING CERTIORARI

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407 First Nat. Bldg., Cincinnati,
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Comes now George S. Hawke, petitioner in the above entitled cause, in which this Court denied his Petition for Writ of Certiorari on April 23, 1945, and within twenty-five days therefrom and at the same term of court, files this his Petition for Rehearing of Order Denying Certiorari, under Rule 33.

The purpose of this Petition is to call attention to material matters of law, which we fear have been inadvertently overlooked by the Court. The decision of this Court denying certiorari may have been caused by the fact, that while petitioner thought he had clearly stated that the precise question was one of first impression, and suggested its novelty and importance, and urged the error of the court below in failing to apply the doctrine of strict construction, petitioner now thinks that the attention of this Court was not properly drawn of this question through his own inadvertence.

In a disbarment proceeding in the District Court against Petitioner (R. 4,5) to strike his name from the roll, a judgment of temporary suspension (R. 36) was appealed to the Sixth Circuit Court of Appeals, which dismissed the appeal without any hearing on its merits, (R. 55) on a Motion of a special committee to Dismiss for Want of Prosecution, (R. 53) which motion claimed that petitioner had not filed a complete Transcript of Testimony, in question and answer form (R. 51,53) while he contends he had complied with the Court's order. (R. 52) For the reason that he could not know from the Order that same was required, he had not filed a transcript including the examination by the Court of both the relator committee and of appellant as upon the professional statements requested in the Motion to Dismiss. (R. 53,54) The Court granted said Motion to Dismiss Appeal for Want of Prosecution, (R. 54) in accordance with its Per Curiam. (R. 55) The same found that

appellant had failed to comply with the Order (R 52) to substitute the "TESTIMONY" in typewritten form for the testimony in narrative form; and that the typewritten transcript filed by appellant bore no official certification or verification; and that appellant was not prosecuting his appeal in good faith upon a true and complete record of the proceedings in the District Court. (R. 55,56)

The Court denied the Petition for Rehearing and denied leave to file a Supplemental Transcript to comply with the Court's requirements expressed in its per curiam, (R.55) whereupon, within time, petitioner brings this Petition for Certiorari.

FOR GROUNDS OF REHEARING PETITIONER RESPECTFULLY REPRESENTS:

I

That while this Court has construed many of the new Federal Rules of Civil Procedure, it has never construed Rule 75 which applies to appellate procedure.

This case involves a question as to the meaning and intent of Rule 75, which petitioner contends has been misconstrued and misapplied by the lower court, so that his appeal was dismissed without any review on its merits. That such judgment of dismissal was legally unwarranted, thereby causing such a miscarriage of justice as to warrant petitioner's efforts to secure this Court's construction of Rule 75 by means of Certiorari.

We submit that the question here presented is new, and that the same is important, and that it should be decided in order to secure uniformity of decision in the lower courts. In our Petition for Certiorari and Brief we endeavored to call attention to the fact that there is a conflict in the instant case with the judgment of another Court of Appeals.

ROBERTSON & KIRKHAM, JURISDICTION Of The SUPREME COURT OF THE UNITED STATES.

> Sec. 292. "Where the decision of the Circuit Court of Appeals sought to be reviewed by certiorari, directly conflicts upon a question of Federal Law, with the decision of another Circuit Court of Appeals upon the same question, the Supreme Court grants certiorari as of course, and irrespective of the importance of the question of law involved." Rule 38, par. 5(b).

ON CERTIORARI, THIS SUPREME COURT HAS CONSTRUED MANY OF THE FEDERAL RULES OF CIVIL PROCEDURE, BUT IT HAS NEVER CONSTRUED RULE 75 INVOLVED HERE, AS WILL APPEAR FROM THE FOLLOWING:

LIST OF DECISIONS OF SUPREME COURT INVOLVING THE CONSTRUCTION OF MANY OF THE RULES OF CIVIL PROCEDURE

Civil Rule No.	Reported in:	Style of Case	Decided
5	64 Sup. Ct. 334	Hall vs. Dawes	Jan. 3, 1944
6 (b)	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
8 (c)	63 Sup. Ct. 477	Palmer vs. Hoffman	Feb. 1, 1943
8 (e)	62 Sup. Ct. 214	U. S. vs. Kales	Dec. 8, 1941
12 (h)	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
13	"	"	"
13	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
14	"	"	"
18	"	"	"
20	"	"	"
24	64 Sup. Ct. 905	Allen vs. Nat. Cash	May 1, 1944
26 (b)	63 Sup. Ct. 477	Palmer vs. Hoffman	Feb. 1, 1943
34	"	"	"
38	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
42	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
42 (b)	64 Sup. Ct. 268	Mercoid Corp. vs. Mid-Continent	Jan. 3, 1944
50	63 Sup. Ct. 1077	Galloway vs. U. S.	May 24, 1943
52	64 Sup. Ct. 406	Dist. of Columbia vs. Pace	Jan. 10, 1944
52 (a)	63 Sup. Ct. 1141	Kelley vs. Everglades	June 1, 1943
52 (a)	63 Sup. Ct. 1333	Schneiderman vs. U. S.	June 21, 1943
53	61 Sup. Ct. 1015	Holiday vs. Johnston	May 26, 1941
54 (b)	62 Sup. Ct. 1085	Reeves vs. Beardall	May 11, 1942
56	62 Sup. Ct. 402	Morton Salt vs. Suppiger	Jan 5, 1942
56	64 Sup. Ct. 724	Sartor vs. Ark. Gas	Mch. 27, 1944
58	64 Sup. Ct. 334	Hill vs. Dawes	Jan. 3, 1944
59	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
69 (a)	64 Sup. Ct. 1015	Huddleston vs. Dwyer	May 15, 1944
73 (a)	63 Sup. Ct. 543	Leishman vs. Associated	Feb. 15, 1943
76	61 Sup. Ct. 1023	Griffin vs. McCoach	June 2, 1941
77 (d)	64 Sup. Ct. 334	Hill vs. Hawes	Jan. 3, 1944
79 (a)	64 Sup. Ct. 334	"	"
81 (b)	64 Sup. Ct. 1015	Huddleston vs. Dwyer	May 15, 1944

From the foregoing complete list, it should be apparent that Rule 75 has never been construed by this Court.

The Rule of the Sixth Circuit Court of Appeals adopting Rule 75 is shown at top of page 4 of the Petition for Writ in this case.

ROBERTSON & KIRKHAM, "JURISdiction ~~PRUDENCE~~ OF SUPREME COURT OF U. S."

> Page 651. "It is obviously important that the Supreme Court keep the lower federal courts informed and in line on the proper solution of the never ending series of problems constantly arising in the fields of federal court jurisdiction and procedure."
>
> Page 652. "Questions of nicety or novelty are constantly presented, not only in respect of jurisdiction but also upon important problems of procedure, and the use of certiorari to settle them is often required although no conflict of decisions exists."

In the Petition for Certiorari, Petitioner used the following language at bottom of page 9, and erroneously thought that said language was sufficient to state that the case was one of first impression:

> "Assignment of Error No. Two. That the Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, to-wit, the intent and scope of Rule 75 of the Federal Rules of Civil Procedure."
>
> "With all possible diligence at our command, we have been unable to find any decision of this Court interpreting or applying Rule 75 of the Civil Rules. WE THEREFORE ASSERT THAT THIS COURT HAS NEVER CONSTRUED SAID RULE AND THAT THE QUESTION IS NEW, AND THAT IT IS A MATTER OF GENERAL IMPORTANCE IN THE PUBLIC INTEREST." (Caps here are used for first time)

For the foregoing reason we submit that the attention of this Court has not been properly drawn to the question, through the language used by the petitioner, and that he did not make it clear that the question was one of first impression and that it was novel and important, and that it had never been decided by this Court.

II

CONFLICTING DECISION WITHIN THE SAME CIRCUIT

In support of Petitioner's contention that Rule 75 should

be construed now by this Court in this action, we call attention to the fact that the Sixth Circuit rendered a prior decision which conflicts with its own decision in the instant case. This fact might indicate that a decision on this question in the Sixth Circuit depends upon what particular combination of Circuit Judges should happen to be sitting upon the bench.

Said former decision of the Sixth Circuit construing Rule 75 was made on May 8, 1940 in

DRYBROUGH vs. WARE, 111 Fed. REP. (2) 548

(Judges Simons, Hamilton and Arant)

Head Note 7. "The appellate court's power to dismiss appeal for insufficiency of the record should not be exercised generally unless omission arose from negligence or indifference of appellant and, where good faith is shown, appellee will be directed to designate such additional papers, used below as he deems necessary, or the court, to avoid injustice, may on proper suggestion, or on its own motion, direct that the omission be corrected by supplemental transcript or remand of cause for finding on controverted fact questions.

Page 57 of the Record herein shows that in Petitioner's Petition for Rehearing in the Court of Appeals, he expressly asked leave to file a Supplemental Transcript of the Testimony in the following language;

"That this court has ample power to permit a correction of the record and to supplement the record by reason of such errors under Rule 75 (h) of the Rules of Civil Procedure, and that the failure of appellant to understand the full import of this Court's Order is not jurisdictional under Rule 75 (d)."

Petitioner prayed in said Petition for Rehearing, that he be granted leave to Supplement the "Transcript of Testimony," which leave was denied by the court's order denying the Petition for Rehearing, (R. 57) from which last order this Petition for Certiorari is predicated.

For the foregoing reasons, Petitioner respectfully urges that a rehearing be granted, and that upon further consideration, the order of April 23, 1945 denying the Petition for Certiorari, be revoked, and that the Writ of Certiorari issue.

GEORGE S. HAWKE, *Petitioner.*

CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is, in my opinion, well founded, and that it is presented in good faith, and not for purposes of delay.

GEORGE S. HAWKE, *Petitioner.*